

Appendix I

Letter from Attorney General Norman Gorsuch to Governor Bill
Sheffield, May 21, 1985, HCS CSSB 208 (HESS)

May 21, 1985



Honorable Bill Sheffield
Governor
State of Alaska
Pouch A
Juneau, Alaska 99811

Re: HCS CSSB 208(HESS) --
federal transfer regional
educational attendance areas
Our file No. 388-052-85

Dear Governor Sheffield:

At Ray Gillespie's request on your behalf, we have reviewed HCS CSSB 208(HESS). This bill relates specifically to two of the state's regional educational attendance areas (REAA's), the Lower Yukon School District and the Lower Kuskokwim School District. Although it raises practical and constitutional issues, we are not necessarily recommending a veto.

The REAA system was created in 1976 to deliver education services in the unorganized borough. The state, outside of municipal school districts, was divided into 21 geographic areas with the exact boundaries drawn to reflect cultural and socio-economic variations among the REAA's. The REAA's represented a major departure from past efforts by the state and federal government to provide educational opportunities to rural children. Those previous mechanisms were centralized in either the state or the Bureau of Indian Affairs (BIA).

In Akiachak, Akiak, Tuluksak, Chevak, and Chefornek, the BIA finances day schools for grades K through 8, while a state regional educational attendance area operates the high schools. The actual operation of the BIA schools is accomplished under a contract between the BIA and the local village entity. On June 30, 1985, the BIA will cease financing the operation of its schools, and their operation and the necessary facilities will pass to the state.

HCS CSSB 208(HESS) is an effort to continue the "local control," consistent with state law, in Akiachak, Akiak,

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Tuluksak, Chevak, and Chefornek which existed under the former BIA contracts. Section 1 of the bill is a clear statement that it is the legislature's intent to achieve that result by establishing new federal transfer regional education attendance areas for these communities.

Section 2 sets up the mechanism by which the communities may participate in the new REAA's. The bill provides for two REAA's, one containing Akiachak, Akiak, Tuluksak, and Chefornek and a second containing Chevak. If a majority of the qualified voters in each of the villages votes in favor of being in the appropriate new REAA, then the village is included. If the election is not held by August 13, 1985 or the village votes against inclusion in the new REAA, then the village will be included within the REAA that currently operates the high school. If new REAA's are formed, the operation of the high schools will be transferred to the appropriate new REAA, which will also assume all existing contractual rights and obligations related to the operation of those schools.

Section 3 provides that each of the federal transfer REAA's will be subject to the requirements of AS 14.08 as any other REAA in the unorganized borough and will be financed under AS 14.17 as if it were part of the school district which surrounds it.

Section 4 provides for an immediate effective date, although the substantive part of the bill recognizes that implementation of the bill will take a certain amount of time; i.e. it allows until August 13, 1985 for the election under sec. 2 to occur.

The bill presents a number of implementation and legal difficulties. First, each of the BIA facilities that the new REAA's will be using requires upgrading to meet fire and safety codes. Those steps could be easily accomplished by the start of school in late August. However, at present there is no entity in operation which can accomplish that work except the current REAA operating the high school in each community. Similarly, there is no one to provide for purchasing the necessary supplies and services for the operation of the respective schools, nor to contract with teachers for the schools except the current REAA. Indeed, given the sensitivity required in hiring a superintendent, it is likely, if the option to form a new REAA is exercised by the respective villages, that functioning school districts could not be in full operation until some time after the start of the 1985-86 school year. We reach this conclusion because a second election will be necessary to elect a school board for each

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of the new school districts which is the body that hires its superintendent.

The probable outcome of the tight scheduling imposed by the bill and the start of the 1985-86 school year is that the Lower Yukon School District and the Lower Kuskokwim School District will, with the advice and direction of the Department of Education, need to make the necessary arrangements for school to start in each of these communities. Any other course of action could result in the students in each of these BIA day schools receiving instruction by correspondence study.

The elections required by sec. 2 also present some special problems. First, the State of Alaska is subject to the preclearance requirements of sec. 5 of the Voting Rights Act of 1965, 42 USC §§ 1973 et seq. This means that the election procedures in HCS CSSB 208(HESS) must be submitted to the U.S. attorney general for approval. A second consideration is that the bill requires the approval of over half of the qualified voters in each community. The election will be occurring when many of the voters will be engaged in commercial and subsistence fishing away from their villages. There is the strong possibility that the required numbers of voters will not be able to participate in the election due to the imperatives of the fishing season. A final consideration that must be addressed is who will supervise the elections. Each of the designated communities is a second class city that could conduct the election. Another alternative is for the division of elections to supervise the election.

In addition to the difficulties of implementation, the bill presents a serious constitutional question under art. II, sec. 19, of the Alaska Constitution. That section provides that the legislature shall pass no local or special act, if a general act can be made applicable.

Article VII, sec. 1, of the Alaska Constitution mandates that the legislature shall provide for public education in the state. AS 14.08 is the expression of a law of general application to the problem of providing education services in the unorganized borough. Indeed, the application of that statute has resulted in the operation of the local high school in each of these villages by an REAA. If AS 14.08 is followed, all of the schools in each of the communities would be operated by the existing REAA. The impact of HCS CSSB 208(HESS) is to carve a special exception out of the general statutory pattern to accommodate the circumstance that the BIA chose to operate these five day schools under contract with the local village entity, which has no relationship to the rationale behind the creation of the REAA's under AS 14.08.

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The prohibition against local and special legislation found in art. II, sec. 19, of the Alaska Constitution limits all powers that the legislature might otherwise exercise under the powers conferred upon it by the constitution. State v. Lewis, 559 P.2d 630 (Alaska 1977), cert. denied 432 U.S. 901 (1977). While the legislature has broad power to regulate public education, it may be argued that this specific application of its power is improper.

To avoid the prohibition against local and special legislation, a bill does not require even application in all areas of the state, but rather it must be reasonably related to a matter of common interest to the whole state. State v. Lewis, supra and Abrams v. State, 534 P.2d 91 (1975).

Under Abrams, HCS CSSB 208(HESS) could be found unconstitutional. In Abrams, special procedures were enacted for the establishment of a new borough in the Eagle River area which was already in the Greater Anchorage Area Borough. In fact the statute had no application, as here, in any other locality and was at a significant variation from existing statutory procedures governing the creation of boroughs. These considerations led to the court holding that statute unconstitutional. While it is a valid legislative purpose to maximize local control of public education, serious questions can be raised when that local control, as in the case of HCS CSSB 208(HESS), is furthered without regard to the factors that led to the creation of the state's existing REAA's and without regard to the impact upon other school districts of the transfer of BIA schools in general.

A better legislative response to the transfer of the BIA schools to the state's system of public education would be the amendment of AS 14.08. By those amendments, the impact of the BIA transfers could be accommodated and considerations of local control could be addressed throughout the unorganized borough.

Notwithstanding our comments, if you sign the bill into law or let it become law without your signature, we believe that the legislation may be defended in good faith. We reach this conclusion because of the imprecision with which courts have addressed local and special problems. However, its successful defense is by no means certain. If you wish to veto this bill, a draft veto message is enclosed for your use. (Or, if you so de-

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cide, it could be modified to serve as a law-without-signature message.)

Sincerely yours,

Norman C. Gorsuch
Attorney General

NCG:WFC:prm